

No. 15,483

**United States Court of Appeals
For the Ninth Circuit**

WILSON H. WALTERS, CHARLES P. CAIN and
KEITH TERRY, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLANTS' PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
HONORABLE JAMES ALGER FEE,
HONORABLE FREDERICK G. HAMLEY,
HONORABLE GUS J. SOLOMON,
Judges of the Ninth Circuit.

JOHN J. KEOUGH
Attorney for Appellants.

JOHN J. KEOUGH
Attorney for Appellants
725 Central Building,
Seattle 4, Washington.

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APPELLANTS' PETITION FOR REHEARING

COME NOW Appellants Wilson H. Walters, Charles P. Cain and Keith Terry and petition this court for a rehearing of the decision and judgment filed in this cause April 11, 1958.

I.

REASONS FOR GRANTING PETITION

A. The Court erred in holding that the following instruction, to-wit:

“A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of an illegal scheme.”

is a correct statement of the law.

B. The Court erred in holding there was sufficient evidence to sustain the giving of the aforesaid instruction.

II.

INTRODUCTION

The Appellants in this case were convicted of the crime of violating the fraud provisions of the Securities Act of 1933, the Mail Fraud Statutes and for conspiracy to violate said statutes. In the lower Court proceedings the trial Court instructed the jury as follows:

“A scheme to defraud may well include later efforts to avoid detection of the fraud. Avoidance of detection and prevention of recovery of property fraudulently obtained may be a material part of an illegal scheme.”

An exception was taken to this instruction on the grounds of insufficient evidence. This Court held on page 6 of its opinion that “the instruction was correct as a matter of law if applicable to the facts.” It is the position of appellants that under the *Gruenwald* Case (*Gruenwald v. United States* (1957) 353 U.S. 391, 1 L.Ed.2d 931, 77 Sup.Ct. 963) the instruction is not a correct statement of the law, and even if it is, there was not sufficient evidence, again under the *Gruenwald* Case, to give the instruction.

It should be pointed out that the *Gruenwald* Case was not decided until approximately seven (7) months after the trial of this case. Counsel for appellants has read the briefs submitted in this case and has discovered that the *Gruenwald* Case was not cited in any of the briefs nor in this Court’s decision. It is for this reason that appellants seek a rehearing on the matter of the aforementioned instruction.

III.

ARGUMENT

A. The Incorrectness of the Instruction.

1. Gruenwald Decision.

In *Gruenwald v. United States* (1957) 353 U.S. 391, 1 L.Ed.2d 931, 77 Sup.Ct. 963, the Supreme Court had before it a case in which the defendants were charged and convicted of "fixing" income tax evasion cases. The principal question in the case was whether or not the prosecution was barred by the Statute of Limitations. The indictment charged that the defendants had illegally secured "no prosecution rulings" from the Internal Revenue Bureau in 1948 and 1949. The Government further charged that as a part of the conspiracy and acts to defraud the United States, the defendants had sought to prevent the detection of their acts as late as 1952 (a three-year Statutes of Limitations was applicable and the indictments were returned on October 25, 1954). The acts of concealment consisted of the following: (1) After the "no prosecution ruling" was obtained, one of the defendants attempted to have the Internal Revenue Bureau's records "doctored," (2) there were extensive efforts to conceal the cash fee paid to Gruenwald, (3) another defendant caused the disappearance of certain records, (4) the taxpayers for whom the rulings were obtained were repeatedly warned not to make disclosures and not to reveal the conspiracy, (5) Gruenwald asked his secretary not to talk to the grand jury and (6) another defendant committed perjury before the grand jury. The Government contended that the conspiracy continued until at least 1952 on two

grounds. (1) that the acts of concealment were necessary to avoid detection of the crime and (2) that the acts of concealment were necessary to protect the taxpayers because the Statute of Limitations on the taxpayers did not run until 1952.

The Supreme Court absolutely rejected the Government's first contention. The Court pointed out that in all conspiracies the conspirators will seek to escape detection and held that acts which are designed to prevent apprehension are not a part of the conspiracy. At 353 U.S. 405, the Court stated as follows:

“A vital distinction must be made between the acts of concealment done in furtherance of the *main* criminal objectives and acts of concealment after the central objectives have been obtained.”

The Court gave two illustrations. In the first it pointed out that kidnappers might conceal their identity and purpose in order to obtain the ransom money. In the second illustration the kidnappers after obtaining the ransom money and releasing the kidnapped person sought to hide the traces of their crime. The first illustration demonstrates a situation in which the acts of concealment were done in the furtherance of the crime whereas the second illustration demonstrates acts which were done as a means of escaping detection and which illustration was applicable to the *Gruenwald* Case. The Court therefore held that if the aim of the conspiracy was to obtain “no prosecution rulings” the overt acts of concealment could not be taken as part of the conspiracy.

The Supreme Court conceded that if the aim of the

conspiracy was to protect the taxpayers from tax prosecution and if the overt acts were in the furtherance of that purpose, then the overt acts could be a part of the conspiracy. The Court noted that in order to protect the taxpayers from tax prosecution it would be necessary to conceal the illegal acts until the Statute of Limitations had run. The Court held however, that the trial court in its charge to the jury did not distinguish between concealment in order to achieve the central purpose of the conspiracy and concealment to cover up an already existing crime. At 353 U.S. 415, the Court stated:

“It is incumbent on the Judge to charge that in order to convict the jury would have to find that the central aim of the conspiracy was to immunize the taxpayers from prosecution and this objective continued in being until October 25, 1951 . . .”

The *Gruenwald* Case thus clearly establishes that acts done to escape apprehension or detection of the wrongful act may only be considered as a part of the crime if the concealment is necessary to obtain the central purpose of the crime.

2. This Court's Decision

This Court in passing upon appellants alleged error held that the instruction was the correct statement of the law, relying upon *United States v. Riedel* (7 Cir. 1942) 126 F.2d 81. It is Appellant's position that the *Riedel* Case is not a correct statement of the law and is repugnant to the decision of the United States Supreme Court in the *Gruenwald* Case. In the *Riedel* Case the question before the Court was whether or not use

of the mails after the defendants had fraudulently obtained certain sums was in furtherance of a scheme to defraud. The pertinent language is cited at 126 F.2d 83:

“We are satisfied however, that the evidence shows, and rather clearly, that the scheme was not over. A scheme to defraud may include later efforts to avoid detection of the fraud. A fraudulent scheme would hardly be taken save for the profit to the plotters. Avoidance of detection and prevention of recovery of money lost by the victim are within, and often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself be not ended.”

The reasoning of the *Riedel* Case is directly contrary to the holding of the *Gruenwald* Case that the crime is completed upon the obtainment of the central purposes. As pointed out in the *Gruenwald* Case every conspiracy will have as one of its purposes the avoidance of detection and punishment. Certainly, every scheme to defraud will have as one of its purposes the retainment of the funds obtained through the fraud. Appellants respectfully contend that there is no distinction between acts performed to conceal the fraudulent acts in order to escape punishment and acts performed to conceal the wrongful acts in order to retain the profits of the fraudulent venture. Certainly the *Riedel* Case and all cases with similar reasoning have been, in effect, overruled by the Supreme Court in the *Gruenwald* Case. Appellants therefore respectfully contend that the decision of this court was based upon a case which is no longer a correct statement of the law.

3. Reversible Error.

Admittedly, counsel in the lower court did not except to the objectionable instruction on the grounds that it was erroneous statement of the law. As pointed out previously however, this case was tried approximately seven (7) months before the decision in the *Gruenwald* Case and counsel, realizing that the instruction was objectionable, did raise objection to it. The Court may consider errors in instruction thought to have resulted in a miscarriage of justice. *Bryson v. United States* (9 Cir. 1956) 238 F.2d 657. Also, as stated in the *Gruenwald* Case, it was incumbent upon the trial court to point out the distinctions between acts of concealment done in furtherance of the main criminal objective and acts of concealment done after the central objectives had been obtained. Appellants in no way seek to criticize the lower court in failing to instruct on the above distinction but merely contend that in order to have a fair trial, that distinction should have been made in the court's instruction.

The distinction between acts done in order to avoid detection and acts done to obtain the central objectives could have been one of the most important factors considered by the jury. One need only make a cursory reading of the record in this case to determine that appellants' position was that they were relying on the representations made by Mr. Jensen and that their representations were made in good faith. There was evidence from which the jury could find that the appellants in order to prevent detection of the alleged fraud made efforts to pacify the buyers of the surplus certificates

while Jensen was doctoring the books (R. 478-482). From this the jury could have believed that the appellants had been acting in concert with Mr. Jensen throughout the whole transaction. Yet to the *Gruenwald* Case the jury is not allowed to consider these later acts as part of the scheme to defraud. In *Krulenwitch v. United States* (1948) 336 U.S. 440, 93 L.Ed. 790, 69 Sup.Ct. 716 and *Lutwak v. United States* (1953) 344 U.S. 604, 97 L.Ed. 593, 73 Sup.Ct. 41, the two cases relied upon by the Supreme Court in the *Gruenwald* Case, somewhat similar evidence was held inadmissible on the grounds that hearsay evidence was inadmissible against conspirators after the central objectives of the conspiracy had been obtained. The instruction in question was clearly error and since it pertained to a material part of the case and an exception was taken to it, the appellants should be entitled to a new trial.

B. Insufficiency of Evidence.

Even assuming that the instruction does not constitute reversible error as a matter of law, it is the position of the appellants that there was insufficient evidence under the *Gruenwald* case to give the instruction. In order to obtain this instruction the government must have proved that the acts to escape detection must have been a main objective of the conspiracy and the scheme to defraud. The main objective of a scheme to defraud is obtained when the wrongdoer obtains the funds for his own purposes and for which he made the misrepresentations. It was therefore incumbent upon the government to introduce evidence from which the jury could have found beyond a reasonable doubt, that

the appellants performed the alleged acts of concealment in order to commit further fraud. In only one place in its brief does the government make such a contention. At page 49 of its brief the government states:

“In defendants’ plans the scheme certainly was far from ended. Had they been successful in deceiving the authorities and concealing their fraud from investors they would thus have proceeded to sell stock in their venture (R. 1036, 1286-1287, 1304), no doubt reloading earlier purchasers with more worthless securities.”

In the first place this contention is completely unsupported in the part of the record cited by the government or elsewhere. Secondly, and assuming that the evidence does show the facts as contended by the government this concealment to deceive the authorities and hide their fraud from the investors must have been in furtherance of the scheme. In other words, the government must have proven that the appellants foresaw the necessity of deceiving the authorities and concealing their fraud from the investors and that their acts were carried out in furtherance of that plan. It was pointed out in the *Gruenwald* case that there must be an agreement between the conspirators to protect the tax payers from tax prosecution and the overt acts must be in furtherance of that purpose. There is absolutely no evidence that the appellants agreed to deceive the authorities so that they might defraud future stock purchasers. In fact, the only evidence which the court had in mind in granting this instruction was the picking up of the surplus certificates by the appellants (R. 1364). This was done after the insurance commission had be-

gun to make inquiries (R. 481) and could be interpreted, at most, as a device to avoid detection.

There being insufficient evidence that the alleged acts of concealment were for the purposes of obtaining the central objectives of the scheme to defraud, the instruction in question should not have been given. As previously discussed, this instruction was prejudicial to the appellants and constitutes reversible error.

IV.

CONCLUSION

The *Gruenwald* Case, decided approximately seven (7) months after this case was tried, establishes a rule of law which manifests that the court's instruction regarding avoidance of detection is not a correct statement of the law and in any event establishes that there was not sufficient evidence for the giving of that instruction. The instruction was detrimental to appellants' theory of the case and was therefore prejudicial. Though trial counsel did not object to it on the ground that it incorrectly stated the law, it was excepted to and in the interest of justice the appellants should be granted a new trial. Counsel did except to the instruction on the grounds of insufficient evidence and therefore did preserve the record on this particular point. Wherefore, appellants respectfully pray that this petition for rehearing be granted.

DATED at Seattle, Washington, May 6, 1958.

Respectfully submitted,

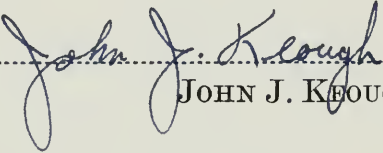
JOHN J. KEOUGH

Attorney for Appellants.

725 Central Building,
Seattle 4, Washington.

CERTIFICATE OF COUNSEL

JOHN J. KEOUGH counsel for appellants herein hereby certifies that in his judgment the foregoing petition for rehearing is well founded and is not interposed for delay.



JOHN J. KEOUGH.

